In the Supreme Court of the United States

October Term, 1966

No. [redacted]22

WILLIAM EARL WALKLING, *Petitioner*,

v.

B. J. RHAY, Superintendent of the Washington State Penitentiary, at Walla Walla, Washington, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATE PRINTING PLANT, OLYMPIA, WASH.

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TO: THE HONORABLE EARL WARREN, CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioner, WILLIAM EARL WALKLING, prays this court to issue a writ of certiorari to review the order of the Supreme Court of the State of Washington, denying his application for a writ of habeas corpus. (Tr. 2.)[1]

COUNTERSTATEMENT OF THE CASE

Except to the extent noted below, the respondent accepts the statement of the case as recited in

[1] "Tr." refers to the record of the proceedings in the Supreme Court of the State of Washington certified to this court by the Clerk of the Supreme Court of the State of Washington)

the petitioner's application to this court for a writ of certiorari.

On line 5, page 4 of the petitioner's application for writ of certiorari, the petitioner, in reciting the particulars of what transpired in the Superior Court of the State of Washington for Thurston County at the time of the hearing on the petition for revocation of his probation relates:

> The petitioner advised the court that he thought an attorney had been hired by his family to represent him.

This allegation of facts by the petitioner appears for the first time in his petition to this court and is not found of record in the case before the Supreme Court of the State of Washington.

It should also be noted in the petitioner's application for a writ of habeas courpus to the Supreme Court of the State of Washington (Tr. 62) that on February 26, 1964, he had been advised by Judge D. J. Cunningham of the Superior Court of the State of Washington for Lewis County of his right to counsel at the time of arraignment on a forgery charge in that county. This, in accordance with the petitioner's contentions, transpired prior to his appearance before the Superior Court of the State of Washington for Thurston County on the petition for revocation of his probation.

At page 5 of the petitioner's application to the court for certiorari, counsel for the petitioner attempts to use to his advantage the position taken by

the Attorney General in this case in which the Supreme Court of the State of Washington was asked to reconsider its decision in *Mempa v. Rhay*, 68 W.D.2d 874, 416 P.2d 104. The position of the Attorney General in this case, as in *Mempa, supra*, was at odds with the results of both cases.

It has been a policy of long standing between the Supreme Court of the State of Washington and the Attorney General of Washington in post conviction proceedings to assume an advisory rather than an adversary role, and to clearly advise the court what the Attorney General believes the law to be, or what the law of Washington should be on the many constitutional issues which arise in these cases. This practice results in the Attorney General of Washington, on many occasions, actually becoming an advocate for the petitioner for habeas corpus, rather than in opposition to his cause. Such a circumstance arose in this case. More importantly, this practice is jeopardized when counsel, as in this case, seek to use to their advantage the advisory role of the Attorney General to the Supreme Court of the State of Washington.

Accordingly, we respectfully request the court to disregard the second paragraph on page 5 of the petitioner's application to this court for a writ of certiorari, as well as the memorandum brief of the respondent before the Supreme Court of the State of Washington which is found between pages 3 and 29 of the transcript of proceedings before the Supreme Court of the State of Washington.

REASONS FOR NOT GRANTING WRIT OF CERTIORARI

A. *Probation Revocation Hearings Are Not "Criminal Prosecutions" Within the Sixth Amendment to the Constitution of the United States.*

Probation is a concept for the rehabilitation or reformation of criminal offenders which is of modern innovation. In Washington, as in most jurisdictions, probation is authorized by statute and is quite frequently utilized by the court in an effort to effect a change in the undesirable behaviorable patterns of the criminal offender. It can result, when probation is successful, in the expunging of the criminal record out of which the probation arises. (RCW 9.95.240)

Consideration by the court as to whether or not the criminal offender is a suitable candidate for the granting of probation comes after conviction, either upon a plea of Guilty or a verdict of Guilty. (RCW 9.95.200)

In the case at bar, the petitioner was represented by counsel at the time of his plea of Guilty to the crime of BURGLARY IN THE SECOND DEGREE, and as well, at the time of application to the court to be granted probation. Both the petitioner and his counsel were then aware of all the facts and law bearing upon his innocence or guilt of the crime charged and any and all appealable errors or irregularities and the consequences of conviction and, as well, of the acceptance of probation under the probation act.

(RCW 9.95.200-9.95.240) At the time of the appearance of the petitioner and his counsel before the Superior Court of the State of Washington for Thurston County following his conviction and requesting that probation be granted, it was the law of Washington that probation revocation hearings are not in the nature of a criminal prosecution, and, the ordinary constitutional right to the appointment of counsel as prescribed by the constitution is not applicable. *Jaime v. Rhay*, 59 Wn.2d 58, 365 P. 2d 772 (1961).

The Sixth Amendment to the Constitution of the United States defining the rights of accused persons, including the right to counsel, provides:

> *In all criminal prosections, the accused shall enjoy* the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the *assistance of counsel for his defense.* (Emphasis ours)

The decision in *Jaime v. Rhay, supra*, finding that the right to counsel did not apply in probation revocation hearings, was based upon a premise that such a hearing was neither a criminal prosecution nor a part of the criminal proceedings leading to the conviction of the defendant as contemplated by the Sixth Amendment. That this is true should be clear. The question before the court at the time of the hearing upon the motion to revoke a convicted de-

fendant's probation is not directed to the probationer's guilt or innocence of the underlying crime, but the inquiry goes to the truth of the accusations made of a violation of the conditions of probation. The sole subject of inquiry is whether or not the convicted defendant has breached the trust vested in him by the court.

The petitioner asserts that a probation revocation hearing brings to the fore, significant questions which may result in liberty or imprisonment and, therefore, due process concepts of right to counsel inhere in the proceedings. Such an argument conveniently overlooks the fact, that the resulting sentence on revocation of probation, is not imposed for the violation of probation, but, the sentence is the punishment for the crime for which the defendant had previously been convicted upon his plea of Guilty, or upon the verdict of the jury of Guilty.

The source of a convicted defendant's rights in a probation revocation hearing, in Washington, arise solely and completely under the probation act (RCW 9.95.200-9.95.240) and not from the constitution of this state or of the United States. A probation revocation hearing, not being a "criminal prosecution", decisions of this court concerning the rights of accused persons to have the assistance of counsel at various stages of the criminal proceedings, we submit, are neither applicable nor controlling under the circumstances. Cf. *Gideon v. Wainwright*, 372 U.S.

335, (1963); *White v. Maryland*, 372 U.S. 59 (1963); *Douglas v. California*, 372 U.S. 353 (1963).

In the petitioner's case before the Supreme Court of Washington, the court in denying his application for a writ of habeas corpus took the position that the disposition of his petition was controlled by its recent decision in *Mempa v. Rhay*, 68 W.D.2d 874-877, 416 P.2d 104 which reads in part as follows:

> Considering probations as a class of criminal offenders, there is a close analogy between their status and the status of others who have pleaded guilty—or have been convicted—and have been committed to institutional custody, supervision and discipline rather than being granted probation. The administration and control of the activities and conduct of the latter group is of course performed by the prison authorities. It would seem farfetched to suggest that the courts should invade this particular sphere of administrative prerogative and, by judicial fiat, exercise some sort of supervisory authority over existing prison administration, standards and practices.
>
> In terms of further insight into the nature of probation and the administration of the probation system, similar reference and analogy could also be made to the functions of the State Board of Prison Terms and Paroles. The Board fixes the period of confinement and the terms and conditions of parole of those criminal offenders who have been committed to state institutional custody. In addition, the Board has the authority and the responsibility for admin-

istration of the state probation system. Judicial scrutiny, review, and control over the everyday matters of prison administration and/or parole administration is not only *not feasible; it is inadvisable* in the light of the particular expertise and training necessary to provide effective institutional custody and parole supervision. Judicial invasion of prison administration inevitably would be most disruptive of prison programing, supervision and discipline. The courts cannot and should not be expected to go into the prisons and decide which prisoners should be treated as "trustees". The point is obvious: prison officials must have effective control and authority in order to maintain an effective prison program. The same can be said of probation programing and administration.

Administrative and field probation officers, as well as prison officials, work diligently to establish workable programs for effective guidance of criminal offenders under their supervision and in their semicustody. Easy access to the courts by probationers to re-evaluate, or challenge, varied aspects of probation programming could well be disastrous in terms of the operation of the Washington state probation system. We are convinced that effective supervision of the probation vehicle by probation officers is a sensitive area, and one not particularly suited to detailed, overall, or even general judicial supervision.

It may seem somewhat more appealing and persuasive to contemplate according full due process rights and privileges to probationers

with respect to the termination of their liberty to be at large in their communities than would be the case with respect to the termination of the privileges of prison inmates. However, we are convinced that, while there are some differences in the status and the potential for rehabilitation as between probationers, inmates, and parolees, the problems of administration and the objectives are basically similar in all three areas. To reiterate: there are no constitutional rights respecting the acquisition of probation status. Logically and rationally, there should be correlatively few, if any, constitutional rights and standards controlling the revocation of probation and matters of administration and supervision of those who have been granted that status.

The above outlined judicial views about the general nature of probation are reinforced by the following language of RCW 9.95.220, which sets out certain legislative policy determinations made with respect to the operation of our probation system. This legislation provides as follows:

> Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he shall cause the p r o b a t i o n e r to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer *may*

rearrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been pronounced by the court and *the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect,* and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. *If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed.* (Italics ours.)

It should be noted that the foregoing statute provides that any peace officer or state parole officer may re-arrest a probationer *without warrant or other process;* furthermore, that the court may thereupon, in its discretion, *without notice, revoke and terminate such probation.* The statute further provides that suspended or deferred sentences may be *summarily revoked, sentence imposed, judgment rendered,* and the defendant delivered to the sheriff for transfer to the state penitentiary. While it is true that the revocation of probation does occur in court, and the function is performed by a judge of the superior court, there is nothing in the statute enacted by the legislature to require the observance and application of due process standards as to this facet of the administration of the

state probation system. We are not inclined, judicially to impose and to judicially assume responsibility for applying to probation those due process standards which unquestionably are applicable and must be observed in the more orthodox aspects of criminal law administration.

The position taken by the Supreme Court of Washington on the right to counsel of convicted defendants appearing before the courts in probation matters, is neither novel nor unique, for a respectable number of jurisdictions have decided this issue in substantially the same way as the Supreme Court of Washington in this case. One of the most recent of these cases is *Brown v. Warden, United States Penitentiary*, 351 F.2d 564 (CCA 7, 1965), Cert. den. 382 US 1028 in which case the court, in its decision, stated in part, as follows:

> An offender's rights under the Federal Probation Act have been construed in *Burns v. United States*, 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266 (1932) and in *Escoe v. Zerbst*, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566 (1935). The act is intended to provide a period of grace in order to aid the rehabilitation of a penitent offender. Probation is conferred as a privilege and connot be demanded as a matter of right. The offender stands convicted and faces punishment. The source of his rights under the Federal Probation Act lies in the legislative mandate, not in the Constitution of the United States.

Congress has declared that a probationer accused of violating his probation "shall be taken before the court for the district having jurisdiction over him."
Section 3653, Title 18 U.S.C.A. Although no trial in any strict or formal sense is required, the legislative directive that the accused probationer shall be taken before a court means that—

> "* * * there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper."
> *Escoe v. Zerbst*, 295 U.S., at 493, 55 S.Ct. at 820.

The inquiry of the court at such a hearing is not directed to the probationer's guilt or innocence in the underlying criminal prosecution, but to the truth of the accusation of a violation of probation. Has the probationer abused the privilege of the period of grace extended to him to aid him in rehabilitation?
Liberty on probation is conditioned on the observance of certain conduct. A breach of the required conduct—not necessarily the commission of a crime—constitutes a violation and serves to terminate the privilege of conditional liberty. Although revocation results in the deprivation of the probationer's liberty, the sentence he may be required to serve is the punishment for the

crime of which he had previously been found guilty.

Thus it appears that under the Federal Probation Act as construed by the Supreme Court, the source and nature of the offender's rights and the issue before the court on hearing of revocation of probation differ from those on imposition of sentence in a criminal prosecution. It follows that an offender who has already been adjudged guilty and sentenced is not entitled to counsel as a matter of right under the Sixth Amendment of the Constitution of the United States or under Rule 44 of the Federal Rules of Criminal Procedure in the hearing on revocation wherein it is determined whether or not he has forfeited the privilege of conditional liberty. *Welsh v. United States*, 348 F.2d 885 (6th Cir. 1965); *United States v. Huggins*, 184 F.2d 866, 868 (7th Cir. 1950); *Gillespie v. Hunter*, 159 F.2d 410 (10th Cir. 1947); *Bennett v. United States*, 158 F.2d 412 (8th Cir. 1946). Decisions concerned with the constitutional right to counsel of an accused at various stages of criminal prosecutions are not controlling. Cf. *Gideon v. Wainwright*, 372 US 335, 83 S.Ct. 792, 9 L. Ed. 2d 799 (1963); *United States v. Tribote*, 297 F.2d 598 (2d Cir. 1961).

Also see *Crowe v. United States*, 175 F.2d 799 (Ca. 4) Cert. den. 338 US 950, Reh. den. 339 US 916; *Richardson v. United States*, 199 F. 2d 333 (Ca. 10); *Shum v. Fogliani*, 413 P.2d

495 (Nevada, 1966); *People v. Wood*, 2 McA 342, 139 N.W.2d. 895 (Mich., 1955.)

In the petitioner's case, it is undisputed that the petitioner was represented by counsel prior to, and at the time of pleading guilty to the crime of BURGLARY IN THE SECOND DEGREE as described in the criminal information. At the time of the entry of the plea of guilty by the petitioner, the "criminal prosecution" had come to an end and no appeal could be taken to the Supreme Court of Washington from a conviction on a plea of guilty, at least insofar as it goes to the question of guilt or innocence. An appeal may be taken upon matters which are collateral to the conviction and go to the jurisdiction of the superior court. However, at the time of the entry of the plea of guilty, any errors or irregularities which might be appealable should be known by the petitioner's counsel and it must be presumed that if there were such errors or irregularities, and most certainly, if they were of constitutional dimensions, counsel would have so advised the petitioner.

Following the entry of the plea of guilty by the petitioner to the crime of BURGLARY IN THE SECOND DEGREE, application was made to the Superior Court of the State of Washington for Thurston County for release from custody on probation. We submit, that at that time, the rights of the petitioner were derived from the State Probation Act (RCW 9.95.200-9.95.240) rather than the Constitution, probationary matters not being a part of

the "criminal prosecution". The Probation Act of Washington does not confer upon convicted defendants, a right to counsel at the time of the revocation of probation followed by the imposition of sentencing and such procedure does not do violence to the provisions of the Constitution.

WHEREFORE, the respondent respectfully submits that the application of WILLIAM EARL WALKLING for a writ of certiorari to review the decision of the Supreme Court of the State of Washington should be denied.

Respectfully submitted,

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STEPHEN C. WAY,
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Counsel for Respondent.